RITA MARQUE MBATHA
versus
JUSTICE CATHERINE BACHI-MZAWAZI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 February & 26 April 2023

Opposed Matter

Applicant in person (Ms *R M Mbatha*)
Mr *A B C Chinake*, for the respondent

MANGOTA J

This is an application on notice of motion for leave to bring civil process against the respondent who is a sitting judge of this court. The application is necessitated by R 12 (21) of the High Court Rules, 2021 which provides that:

> "No summons or other civil process of the court may be sued out against the President or any judges of the High Court without leave of the court granted on court application"

a) HISTORY

The case which the applicant and the respondent ("the parties") placed before me has a history of its own. The history has its roots in HC 9/22 wherein one Farai Bwatikona Zizhou ("Zizhou") and the current applicant are the applicant and the respondent respectively.

HC 9/22 was allocated to the respondent who, in the course of her work, set it down for 27 July, 2022. Reference is made in the mentioned regard to Annexure JCBM 1 which is at p 46 of the record. The respondent did not deal with the case on the mentioned date. She did not do so owing to the indisposition of the applicant who, on 27 July 2022, wrote to the Judge President complaining that:

i) the respondent had fast-tracked the hearing of HC 9/22;

ii) she had given her 24 hours within which she had to prepare for the case when she was
iii) not in her best of health – and
iv) she would not therefore get a fair hearing when, according to her, Zizhou was known to the respondent.

Reference is made to the letter which appears at p 48 of the record.

On receipt of the above-mentioned letter, the Judge President wrote to the respondent on 28 July, 2022. She invited her to comment on the allegations which had been raised. Reference is made to Annexure JCBM 2 which is at p 49 of the record.

In her response which is contained in Annexure JCBM 3, p 53 of the record, the respondent advised that:

a) she initially set the matter down for 28 June, 2022 and that, prior to the mentioned date,
b) the applicant had written advising her that her Heads of Argument had been misfiled;
c) the applicant did not turn up for the hearing of 28 June, 2022 – and
d) in the presence of Zizhou who had come for the hearing, she instructed her clerk to re-set the matter down for 10 am of 15 August, 2022.

She denied, in another memorandum which she wrote to the Judge President on 25 August 2022, Annexure JCBM 4 which is at p 54 of the record, that she knew Zizhou or the latter's legal practitioners.

Following her investigation of the complaint which she had received, the Judge President wrote to the applicant on 29 August, 2022. Reference is made to Annexure JCBM 7. It is at p 57 of the record. The Judge President advised the applicant, in the same, that the respondent refuted the allegation that she was known to Zizhou or that she has any connection with him. She advised the applicant that it was brought to her attention that the matter had been set down for 15 September, 2022 which date, it was her view, the applicant was unhappy with. She advised the applicant, if such was her wish, to seek audience with the respondent beforehand and bring to the latter's attention any concerns which she had regarding the set down of the matter or any other issues which were of concern to her.

The record is silent on whether or not the respondent's clerk set the matter down for 10 am of 15 August, 2022 as had been instructed of her. The probabilities are that she did not. The letter which the clerk wrote to the applicant on 28 July, 2022 seems to confirm the observations which I make on the matter which relates to the set down of HC 9/22. The letter appears at page 58 of the

record. It, in my view, is a response to the letter which the applicant wrote on 27 July, 22. It reads, in the relevant part, as follows:

"Your letter dated 27th July, 2022 was placed before Honourable Justice Bachi-Mzawazi who commented as follows:

> "We had set this matter down for case management. You did not turn up but instead wrote a letter excusing yourself. We are proceeding to set down the matter for the 15th of September, 2022 at 10 am. If you have not filed a copy of the heads you claim to have filed by then, we will proceed without them."

Annexure JCBM 8 which appears at p 58 of the record is the letter which the applicant wrote to the registrar of this court on an urgent basis. It is dated 15 September, 2022. Attached to it is a sick leave form which the doctor who is at IKOR CARE CLINIC completed in respect of the applicant. The form reads, in part, as follows:

> "To whom it may concern
> Please be advised that
> Patient name…..Mbatha Rita
> Attended surgery on 15/9/22
> She has been granted….unfit for duty
> For the period 15/9/ 22 to 21/9/22 inclusive due to illness.
> I will review his/her condition".

The applicant implored the registrar to forward the letter to the respondent as, in her own words, a matter of extreme urgency. She copied the letter and the sick leave form to the respondent's clerk.

b) APPLICATION

It is in the context of the above-observed set of matters that the application will be considered as well as determined. The context centers on events of 15 September, 2022 when the applicant came to court for the hearing of HC 9/22. She presented herself in the respondent's chambers in the absence of Zizhou or the latter's legal practitioners. She and Zizhou's legal practitioners later appeared in open court on the same date.

i) IN RESPONDENT'S CHAMBERS

It is not clear if the applicant entered the chambers of the respondent at the invitation of the latter or she called into the same uninvited. She alleges that the respondent called her into her

chambers on the morning of 15 September, 2022. The respondent's statement on the matter at hand is to the contrary. She claims, in para 23.5 of her opposing affidavit, that the applicant came to her chambers uninvited. She states that, when her clerk walked into her chambers to collect records for the day, she learnt that the applicant had been following her within the precincts of the court building and then behind her (the clerk) with a letter and she was right at the door of her chambers. She alleges that her clerk advised her of the presence of the applicant whereupon she directed her clerk to usher the applicant and Zizhou into her chambers because it was almost time for management of their case. She avers that, when the applicant stepped into her chambers, she observed that the applicant was alone. She states that, upon her inquiry about the presence of Zizhou, her clerk advised her that Zizhou had not yet arrived at court. She states that she offered a seat to the applicant and, simultenously, directed her assistant to look for Zizhou's contact details with a view to ascertaining the latter's whereabouts.

ii) APPLICANT'S CASE

It is during the time that the applicant was in the chambers of the respondent that she alleges that the respondent traumatized, threatened and shouted at her for no apparent reason other than her intention to protect her rights. She claims that the respondent advised her that she (the respondent) wanted her to consent to the setting aside of the judgment which had been entered against Zizhou. She alleged that she refused to agree to the respondent's request as a result of which the latter shouted at, and threatened, her. She maintains that the shouting and yelling at her continued in open court, Court L, the proceedings of which were recorded on tapes. She alleges that the manner in which the respondent addressed her in court was demeaning. She claims that the transcript of the court proceedings would bear testimony to the respondent's hostility as well as gross injustice towards her. She contends that she is entitled to compensation for the breach of her constitutional rights which breach, she alleges, occurred in the respondent's chambers. She, according to her, intends to claim payment of the sum of USD 500 000 as damages for the breach of the right which the constitution of Zimbabwe accords to her. The application, she contends, is meant to enable her to assert her right to make the claims. She claims that the application has been brought about by the respondent's irregular, capricious and arbitrary actions and also by the fact of the respondent's knowledge of Zizhou. The conduct of the respondent's, she charges, constitutes

an abuse of judicial function which, in effect, is akin to the criminal offence of contravening s 174 of the Criminal Law (Codification and Reform) Act.

iii) THE RESPONDENT'S CASE

The respondent denies having ever harassed, threatened or intimidated the applicant as the latter alleges. She states that she set HC 9/22 down for case management. She insists that, prior to 15 September 2022, she knew neither the applicant nor Zizhou. She expresses her perplexity for the applicant's suit of her under HC 6446/22 seeking leave of the court to sue her for a sum which is in excess of USD 500 000. She alleges that the applicant's intention is to terrorize her as well as to bring her name into disrepute. The application, she insists, is malicious in the extreme sense of the word. She claims that she acted within the scope of her judicial function. She asserts that she did not act in any manner which would give rise to a valid cause of action against her. She denies having ever shouted at, or traumatized, the applicant. The applicant, she insists, did not establish any valid cause of action against her. She avers that the applicant failed to outline the defamation and/or injury which she suffered. She denies that she knows Zizhou or that she ever acted for him. She maintains that the application is malicious, frivolous, vexatious and defamatory of her. She moves me to dismiss it with punitive costs.

On a conspectus of the papers which the parties placed before me, the application cannot succeed.

iv) RULE 12(21) AND MISCHIEF

There is, in my view, a reason why R12 (21) was promulgated. There is a further reason why the rule was/ is meant to apply only to the President of Zimbabwe and to Judges of this court or of courts which are superior to this court to the exclusion of any person who is within the length and breadth of Zimbabwe. Whilst the rule specifically makes reference to the President and Judges, the reality of the matter is that it is not the President whom the applicant intends to sue. She intends to sue a sitting judge of this court.

The mischief which the rule is meant to serve is as clear as night follows day. The work of a judge, more often than not, places him on a collision course with litigants. The decisions which he makes on a day-to-day basis in respect of litigants whose cases he decides are, in my view, the *raison de'etre* of the promulgation of the rule. It, to all intents and purposes, protects the judge against possible delictual suits by litigants whose cases he will have decided against. The rule acts as an indemnity to the judge so that he is able to discharge the duties of his office without fear or

favour. Litigants who are prone to sue even where the judge has genuinely but mistakenly ruled against them would, without indemnification by the rule, have judges exposed to a multiplicity of delictual suits. Without the rule, therefore, judges would always be at the mercy of such litigious litigants as a result of which they would spend more of their time defending themselves from suits than dispensing justice to all manner of people who come to court in search of the same. The rule therefore gives the judges an assurance that they can go about their duties without anyone raising a finger against them unless the person who intends to sue justifies the need on his part to sue a sitting judge.

This application and the suit which the applicant intends to institute, if this application were to succeeds, are a clear example of why R 12 (21) was established. The respondent does not mince her words. She states, in para 15 of her opposing affidavit, that the applicant brought the application to terrorize her and/or to bring her name into disrepute. She asserts in pp(s) 35 and 45 of her founding affidavit respectively that the applicant has a vendetta against her and that the claim she intends to institute amounts to extortion.

v) LAW AND EVIDENCE

The trite position of the law is that an applicant must stand or fall by his founding affidavit and the facts alleged therein. …because these are the facts which the respondent is called upon to either affirm or deny: Hebstein and van Winsen, *Civil Practice of Superior Courts of South Africa,3rd edition*, p 80. An applicant for relief must-save in exceptional circumstances-make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion…and is not permitted to supplement it in his replying affidavits –the purpose of which is to reply to averments made by the respondent in his opposing affidavits- still less make a new case in his replying affidavits: *Bayat & Ors* v *Hansa & Anor*, 1953 (3) SA 547 at 553.

The above-mentioned principle of the law of evidence and/or procedure holds true in this application as, indeed, it does at all times. The affidavit of the applicant leaves a lot to be desired. It is couched in general terms. It states that the respondent traumatized, harassed, threatened and/or intimidated the applicant. It, for reasons which are not known, does not mention the words which the respondent uttered when she allegedly harassed, intimidated, threatened or traumatized the applicant. Those words are a *sine qua* non aspect of an application of the present nature. It is from my reading of them that I am able to assess if the respondent did what the applicant alleges she

did. It is also from them that I am able to assess if she suffered any injury which, at law, warrants that she takes the respondent to court. It is from the words which the respondent allegedly uttered that the applicant is able to build a case against the respondent for her intended suit.

The statement which the respondent made which is to the effect that the applicant does not have a cause of action for this application and for the intended suit holds true. It does because the applicant did not challenge it at all in her answering affidavit. It is trite that what is not denied in affidavits is taken to have been admitted: *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC); *D.D. Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92

It follows from the above-stated set of matters that, for the applicant to succeed in her application, she must establish her cause of action to sue the respondent. She should, in other words, tell her story in a clear and undiluted manner. She should show whether or not she is suing in delict and, where she is able to show that, she should establish the branch of law in terms of which she is able to sue the respondent. The statement which she makes in paragraph 31 of her founding affidavit leaves her application in complete disarray. She asserts, in the same, that the only way that she can vindicate her rights is through suing the respondent in terms of both the common law and the constitution of Zimbabwe. She does not explain the meaning and import of her statement. She devotes 43 paragraphs of her founding affidavit to sections of the constitution of Zimbabwe, the common law, the respondent's alleged bias against her and other matters which she describes in some adjectives without mentioning them by word. In all this, she mentions, only in passing, that the respondent defamed her. She does not tell of the words which the respondent uttered in her alleged defamation of her, if ever she did. She does not state whether her application is pleading the delict of defamation or that of *actio injuriarum* or both. Other than repeatedly stating that the respondent threatened, harassed, traumatized and/or yelled at her, she does not bring out the words which the respondent uttered, if ever she did. I cannot therefore ascertain if any of the allegations which she is making against the respondent constitutes a cause of action which warrants that I allow her to sue as she intends to do.

The applicant can only sue where she has a cause of action against the respondent. She will, in other words, be allowed to sue where she has a combination of facts which are material for her to prove in order to succeed in her action: *Dube* v *Banana*, 1998 (2) ZLR 92 at 95. Where she has no such facts, as appears to be the case in this application, allowing her to sue would be akin

to allowing her to toss her spear in the dark in the vein hope that she might, in some way or other, get at her target. Where there is no cause of action, as has been found *in casu*, the suit would, in all probability, be frivolous and vexatious. It cannot, under the observed set of circumstances, succeed. Allowing it to be instituted would be tantamount to allowing a litigant who wants to sue just for the sake of doing so to sue albeit that his suit is not divorced from useless suits which only serve to waste the time of the court and nothing more than that.

The applicant, it is evident, does not plead the delict of defamation in her affidavit. All she does is to allege that the respondent's conduct was/is defamatory of her. She does not state the manner in which the conduct is defamatory of her. Nor does she make any effort to define what the delict of defamation entails to enable me to assess and satisfy myself if she, indeed, has a solid case against the respondent. For the claim which is based on the delict of defamation to succeed, she should, in short, have alleged that the respondent published a statement which was/is defamatory of her. Defamatory of her in the sense that the statement which she published to someone other than the applicant caused the latter's reputation to be impaired or lowered in the estimation of right-thinking persons generally: Jonathan Burchell, *Principles of Delict, Juta & Co. Ltd*, p 152; Jonathan Burchell (1974), SALJ 178 ff.

Even the delict of impairment of dignity which is commonly referred to as *actio injuriarum* cannot be sustained on the allegations of the applicant which are to the effect that the respondent harassed, threatened, intimidated or traumatized her. The words which the respondent uttered in her act of harassing, threatening, intimidating or traumatizing the applicant must clearly be spelt out by the latter in such an application as the present one. It is from an assessment of such words, as the respondent uttered-if she did- that I am able to ascertain if the words which were so uttered constitute acts of harassment, threats, intimidation and/or traumatization and, therefore, an impairment of the applicant's dignity. The applicant should have shown, in this application, that the conduct of the respondent amounted to an impairment of her dignity and that the same was perpetuated with the necessary *animus injuriandi.*

The applicant's case falls on all fours. The respondent challenged her to state her cause of action for the intended suit and she failed to do so. The transcript of court proceedings of 15 September, 2022- Annexure JCBM 9- upon which she places reliance has nothing which is defamatory of, or injurious to, her person. The annexure contains no words of harassment,

intimidation, threats or traumatizing nature. The letter which she wrote to the Secretary of the Judicial Service Commission on 16 September, 2022 is to an equal effect. It is, as in other correspondence and/or processes of court, couched in general terms which do not bring out the sting which should propel the applicant to sue as she intends to do.

It is, in general terms, not the intention of the court to deny litigants access to them. Litigants who have clearly defined causes of action and, therefore, justified claims should, at all material times, take advantage of the existence of the court to which they should, by all means, file suits as and when they so please. However, where, as *in casu*, the applicant does not tell the branch of law under which he intends to sue and/or his cause of action, it will be an exercise in futility for me to allow him or her to sue. He will not sue where his cause of action remains undefined as it is in this application.

What appears to come out of the history of the parties is that the applicant made up her mind not to be tried by the respondent for reasons which were/are best known to herself. Her application for the respondent's recusal as read with the allegation that the latter was known to Zizhou confirms the observed matter. Her application for leave to sue would appear to be nothing else other than one which effectively drives the respondent away from hearing HC 9/22. She, in my view, almost succeeded in her endavaours in the mentioned regard. She, in other words, set herself on a collision course with the respondent much to the embarrassment of the latter who, even without the recusal application, is likely not to want to hear HC 9/22 as she should.

c) DISPOSITION

The applicant failed to prove her case on a preponderance of probabilities. The application is, in the result, dismissed with costs.

Kantor and Innerman, respondent's legal practitioners